Supreme Court, U.S.
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No. 96-1798

In The

Supreme Court of the United States

October Term, 1996

CHRISTINA LEAP and PAUL SIPPLE, Individually and PAUL SIPPLE, Executor of the Estate of MARTHA ROSE SIPPLE, Deceased,

Petitioners,

vs.

PAUL MALONE, ALLOY FABRICATORS, INC. and F&K LEASING, INC.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the United States Courts of Appeal, in unison, permit a jury to reject expert testimony?

2. Whether the decision of the United States Court of Appeals for the Sixth Circuit in the present case is congruent with prior decisions of the Supreme Court of the United States regarding a jury's rejection of expert testimony?

3. Whether the decision of the United States Court of Appeals for the Sixth Circuit in the present case is congruent with prior decisions of the Sixth Circuit regarding a jury's rejection of expert testimony?

LIST OF INTERESTED PARTIES

The Petitioners are correctly identified in the caption of the case.

The Respondents are correctly identified in the caption of the case. David F. Harrod of Carter, Harrod & Cunningham is counsel of record for Respondents.

Each of the Respondents join in this Brief in Opposition. For the Respondents, neither parent companies nor nonwholly owned subsidiaries exist.

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Respondents respectfully request that this Honorable Court deny the Petition for Writ of Certiorari ("Petition") by which Petitioners seek review of an Opinion of the United States Court of Appeals for the Sixth Circuit. The Opinion for which Petitioner seeks review is *Leap v. Malone*, No. 95-6470 (6th Cir. Dec. 23, 1996).[1]

STATEMENT OF JURISDICTION

The Petitioners have timely filed their Petition for Writ of Certiorari. The Petitioners have properly invoked the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition of the Case Below

The present case arises out of a vehicular accident which occurred on November 25, 1992, in McMinn County, Tennessee, between a 1988 Dodge automobile driven by Petitioner Paul Sipple, the grandfather of Petitioner Christina Leap, and a 1986 tractor-trailer driven by Respondent Paul E. Malone. (R. 1.)[2] As a result of the accident, Petitioner Leap sustained serious injuries resulting in extensive hospitalization and therapy. Petitioner Leap incurred pre-trial medical expenses in the amount of Two Hundred Forty-Six Thousand Six Hundred Seventy-Seven and 83/100 Dollars ($246,677.83). (R. 78: Carol Sipple at Tr. 131.)

Prior to trial, Respondents Malone and F & K Leasing,

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1. For the convenience of the Court, all citations to the foregoing Opinion are to a copy of the Opinion incorporated in the Petition as Appendix A.

2. All citations to transcripts, exhibits and a record in the underlying case are to such as were submitted to the United States Court of Appeals for the Sixth Circuit.

Inc., admitted liability for compensatory damages sustained by Petitioner Leap, leaving for resolution the issues of the amount of compensatory damages and the entitlement of Petitioner Leap to recovery of punitive damages. Another issue for resolution was the liability, if any, of Alloy Fabricators, Inc., for the negligence of Malone. Petitioners had filed suit against Alloy Fabricators, Inc., the lessee of the tractor-trailer which, at the time of the accident, Malone was driving for his employer, F & K Leasing, Inc.

The case was tried in the United States District Court for the Eastern District of Tennessee at Chattanooga before the Honorable Curtis L. Collier and a jury of nine (9) men and women. The trial began on Monday, July 24, 1995, and concluded on Wednesday, July 26, 1995. At the conclusion of Petitioner's proof, the District Court directed a verdict in favor of the Respondents on the issue of punitive damages. Following completion of all proof, argument of counsel and the charge of the Court, the jury retired for deliberations and returned a verdict in favor of Leap and against Malone and F & K Leasing, Inc., in the total amount of Seven Hundred Fifty-Four Thousand Six Hundred Seventy-Seven and 83/100 Dollars ($754,677.83). By jury verdict, Alloy Fabricators, Inc., was dismissed from the case. (R. 64.)

Following the trial, counsel for Petitioner Leap timely filed Motions for Additur and/or New Trial on the issues of punitive damages, damages for Petitioner Leap's loss of earning capacity, exclusion of an accident report and exclusion of certain testimony during the trial. The foregoing Motions were denied and overruled in a Memorandum and Order of the United States District Court for the Eastern District of Tennessee at Chattanooga entered on September 19, 1995. (Pet. at App. D.) Consequently, counsel for Leap filed a Notice of Appeal and presented the foregoing issues for resolution by the United States

Court of Appeals for the Sixth Circuit. In an Opinion entered December 23, 1996, the United States Court of Appeals for the Sixth Circuit affirmed the decision of the District Court. Subsequently, Petitioners moved for a Rehearing *En Banc* or, alternatively, for a Panel Hearing which was denied by Order of the United States Court of Appeals for the Sixth Circuit entered February 10, 1997. (Pet. at App. B.)

B. Correction of Misstatements in the Petition

The Opinion of the United States Court of Appeals for the Sixth Circuit correctly describes the underlying facts of the present case. However, the Petition contains misstatements regarding the trial phase of the case. Pursuant to Sup. Ct. R. 15.2, Respondents respectfully bring to the attention of this Honorable Court misstatements in the Petition.

Petitioner states categorically that the testimony of Petitioner's experts, particularly the testimony of Anthony Gamboa, Ph.D., was both "uncontradicted" and "unimpeached." (Pet. at 5, 8, 9, 17.) The Petition further misstates that no rebuttal testimony contradicts the expert testimony pertaining to Petitioner Leap's education, earning capacity and other issues. (Pet. at 9, 11.)

The foregoing misstatements are clearly contrary to the record below. Dr. Gamboa's report, (Ex. 64-R. 80: Ex. 64 at Tr. 284), and his testimony on cross-examination, (R. 80: Dr. Gamboa at Tr. 314-15), conclusively establish that he neither reviewed nor relied upon the deposition testimony of Petitioner Leap's treating physicians when arriving at his own opinions regarding Leap's loss of earning capacity. Likewise, Dr. Gamboa neither reviewed nor relied upon Petitioner Leap's transcript from Northern Kentucky University where she was attending college classes following the accident. It is undisputed that, when he arrived at his opinions and conclusions, Dr. Gamboa did not

have the benefit of information relating to the course work completed by Petitioner Leap following the accident in question.

Dr. Gamboa's testimony that Plaintiff would be confined to a "sheltered workshop setting," (R. 80: Dr. Gamboa at Tr. 313), is incredible, given the fact that Petitioner Leap testified that, following the accident in question, she had completed college courses in psychology, chemistry, sociology, pre-calculus and an analytical writing course and that she would be enrolled full-time in Northern Kentucky University in the fall of 1995 for courses in physics, statistics and biological terminology, (R. 80: Christina Leap at Tr. 269, 271-72.) Petitioner Leap testified that she is working toward completion of a college degree with a physical therapy major and that her occupational goal is to become a physical therapist. (R. 80: Christina Leap at Tr. 272-73.)

Petitioner Leap's experts gave inconsistent testimony. Dr. Gamboa testified that, in his opinion, Petitioner Leap was occupationally disabled from a neuropsychological perspective. (R. 80: Dr. Gamboa at Tr. 287-88). He was unaware that Dr. Dennis Sprague, Petitioner's expert neuropsychologist, had testified that he could not state whether or not Petitioner Leap would ever regain her pre-accident level of intelligence. (R. 80: Dr. Dennis Sprague at Tr. 276; Dr. Sprague's deposition: p. 32.)

The evidence and proceedings in the District Court negate Petitioner's categorical assertion of uncontradicted, unimpeached testimony. The Court of Appeals, in its Opinion, made the following conclusion:

> Defense counsel conducted an effective cross-examination of Dr. Gamboa, however, exposing apparent weaknesses in his opinion. And the jury could reasonably have concluded that the dismal picture of Miss

> Leap's future presented by Dr. Gamboa was contradicted by other evidence. Miss Leap herself testified that she hoped to become a physical therapist and had resumed — albeit with tutorial assistance — a college curriculum.

(App. A at A-7.)

REASONS FOR DENYING THE WRIT

I.

THE UNITED STATES COURTS OF APPEAL, IN ACCORD WITH EACH OTHER, PERMIT A JURY TO REJECT EXPERT TESTIMONY EVEN IF SUCH TESTIMONY IS UNCONTRADICTED.

Each of the Circuits upholds the general rule that the trier-of-fact is under no obligation to accept the testimony of an expert witness even if the testimony of the expert witness is unimpeached or uncontradicted. *Aldridge v. Baltimore and Ohio R.R.*, 789 F.2d 1061, 1065 (4th Cir. 1986); *Del Mar Avionics, Inc. v. Quinton Instrument Co.*, 836 F.2d 1320, 1325 (Fed. Cir. 1987); *Dickerson v. Amax, Inc.*, 739 F.2d 270, 273-74 (7th Cir. 1984); *Fisher v. Vassar College*, 70 F.3d 1420, 1447-48 (2d Cir. 1995); *Gregg v. U.S. Indus.*, 887 F.2d 1462, 1469-70 (11th Cir. 1989); *Greyhound Lines-West v. Marshall*, 575 F.2d 759, 762 (9th Cir. 1978); *Howell v. Gould, Inc.*, 800 F.2d 482, 485 (5th Cir. 1986); *Moe v. Avions Marcel Dassault-Breguet Aviation*, 727 F.2d 917, 930 (10th Cir. 1984), *cert. denied*, 469 U.S. 853 (1984); *Mopkins v. St. Louis Die Casting Corp.*, 569 F.2d 454, 455 (8th Cir. 1978); *Powers v. Bayliner Marine Corp.*, 83 F.3d 789, 797-98 (6th Cir. 1996), *cert. denied*, 136 L. Ed. 375 (1997); *Quinones-Pacheco v. American Airlines, Inc.*, 979 F.2d 1, 5 (1st Cir. 1992); *United States Steel Corp. v. Occupational Safety and Health Review Comm'n.*, 537 F.2d

780, 783-84 (3d Cir. 1976). Contrary to Petitioner's assertion, no direct and unresolved conflict exists between the Circuits regarding a jury's refusal to accept expert testimony.

To force a jury to render its decision within the parameters of expert testimony is to place the responsibility for the ultimate decision in a case in the hands of experts rather than the hands of the Court. *Del Mar Avionics*, 836 F.2d at 1325. In *Del Mar Avionics*, the defendant asserted that the Trial Court "erred in failing to construe the patent terms" of an invention for the electronic detection of heart abnormalities "in accordance with the testimony" of the defendant's patent expert. *Id.* On appeal, the United States Court of Appeals for the Federal Circuit concluded that "a district court is not obliged to adopt a conclusion stated by an expert witness." *Id.* Even though the expert testimony in the underlying case was "generally correct and accurate," the court was obligated only to "weigh expert and other testimony; it is the Court's, not the expert's, responsibility to decide the case." *Id.* The "finder of fact" has no obligation to accept the uncontradicted testimony of an expert simply because the expert is qualified as such. *Fisher*, 70 F.3d at 1447.

"Uncontradicted expert opinion testimony is not conclusive, and the jury has every right not to accept it." *Gregg*, 887 F.2d at 1470. In *Gregg*, the defendant challenged the jury's rejection of the testimony of the defendant's experts regarding valuation of the plaintiff's company. *Id.* at 1469-70. On appeal, the United States Court of Appeals for the Eleventh Circuit noted that the defendant neither objected "to the proposed jury instruction regarding the expert testimony . . . nor did it dispute the charge given at trial that the jury was to consider the expert testimony and give it the weight the jury determined the testimony deserved." *Id.* at 1470 (footnote omitted). The court concluded that the expert testimony was not conclusive and that the jury had "every right not to accept it." *Id.*

In like manner, the Petitioner in the present case neither objected to the jury instructions nor disputed at trial that the jury was not obligated to accept the testimony of the experts. (R. 80: Jury Charge at Tr. 365.) "Jurors are not bound to accept the uncontradicted opinions of expert witnesses but have a right to use their own common sense and experience and to draw all reasonable inferences from the physical facts and occurrences." *Remington Arms Co. v. Wilkins*, 387 F.2d 48, 54 (5th Cir. 1967) (citing *Seaboard Sur. Co. v. First National Bank of Montgomery*, 263 F.2d 868, 871 (5th Cir. 1959)).

"Opinions testified to by an expert are certainly not binding on the court." *Mopkins*, 569 F.2d at 455. Testimony by an expert witness is "subject to the same tests and credibility and weight as is any other admissible evidence." *Moe*, 727 F.2d at 930.

"The rule is well settled that expert opinion testimony, even if not directly contradicted, is not ordinarily binding on a jury . . . . the rule is particularly apropos in a case where the expert's testimony, read in the larger context of the evidence as a whole, lacks great convictive force." *Quinones-Pacheco*, 979 F.2d at 5. In *Quinones-Pacheco*, the plaintiff, who alleged that she had suffered injuries in a bumpy flight through turbulent weather, appealed the verdict in favor of the defendant, American Airlines, and challenged the jury's treatment of her expert's medical opinion testimony. The Court of Appeals identified "four major weaknesses" with the expert's medical opinion on causation. *Id.* The Court of Appeals concluded that, even though the expert's medical opinion testimony was not directly contradicted, the testimony, "in the larger context of evidence as a whole" lacked "great convictive force" and the jury was not bound by the testimony. *Id.*

In the present case, the "convictive force" of the testimony of Petitioner's expert, Dr. Gamboa, was decreased in the "larger context of the evidence as a whole" by the inadequate basis for Dr. Gamboa's report and testimony, the deposition testimony

of Petitioner's treating physicians, the post-accident educational achievements of the Petitioner at Northern Kentucky University and inconsistencies with the testimony of Dr. Sprague, an expert for the Petitioner. *Id.* (R. 80: Dr. Gamboa at Tr. 314-15; R. 80: Christina Leap at Tr. 269, 271-72; R. 80: Dr. Sprague at Tr. 276.) Even if Dr. Gamboa's testimony stood unassailed in "the larger context of the evidence as a whole," his testimony would not be "ordinarily binding on a jury." *Quinones-Pacheco*, 979 F.2d at 5. "Expert testimony need not be accepted even if uncontradicted." *United States Steel*, 537 F.2d at 783; *see Moore v. Johns-Manville Sales Corp.*, 781 F.2d 1061, 1064-65 (5th Cir. 1986) (concluding that juries "are not bound to follow the experts"); *Jones v. N.V. Nederlandsch-Amerikaansche Stoomvaart Maatschappij*, 374 F.2d 189, 190 (3d Cir. 1966).

The alleged conflicts among the circuits regarding the treatment of expert testimony disappear upon a closer analysis of the cases cited by Petitioner. This Court may easily reconcile the decisions in *Potucek v. Cordeleria Lourdes*, 310 F.2d 527, 531 (10th Cir. 1962), and *Stafos v. Missouri Pacific R.R.*, 367 F.2d 314, 317 (10th Cir. 1966), with the later decision by the Court of Appeals for the Tenth Circuit in *Moe*, 727 F.2d at 930. The cases of *Stafos* and *Potucek* speak of a duty to honor "controlling, positive, uncontradicted and unimpeached" evidence. *Potucek*, 310 F.2d at 531; *Stafos*, 367 F.2d at 317. The decision in *Moe* states that "expert witness testimony is subject to the same tests of credibility and weight as is any other admissible evidence." *Moe*, 727 F.2d at 930. As required by *Moe*, the trier of fact determines the weight to be given to expert and any other testimony. If the trier of fact finds such testimony to be "controlling, positive, uncontradicted and unimpeached," the trier of fact must honor its finding. *Stafos*, 367 F.2d at 317. The earlier decisions of *Stafos* and *Potucek* do not absolve the jury of its paramount responsibility to evaluate the credibility of testimony and to weigh the testimony with all the evidence.

Furthermore, the expert testimony of Dr. Gamboa in the present case was neither unimpeached nor uncontradicted. The Court of Appeals in *Stafos* clearly provides that, if the evidence is not "all one way," the jury has absolutely no responsibility to "honor" the expert testimony. *Stafos*, 367 F.2d at 317. Likewise, the Court of Appeals in *Potucek*, in dicta of the case, discusses a responsibility to honor uncontradicted and unimpeached evidence only where "no circumstance reflected on the record casts doubt on its verity." 310 F.2d at 531.

Petitioner's reliance upon *Aetna Life Ins. Co. v. Kelley*, 70 F.2d 589, 593 (8th Cir. 1934), is without merit, and the rule in *Aetna* upon which Petitioner relies is inapplicable to the present case. In *Aetna*, the Court of Appeals concluded that lay witnesses were incompetent to testify about the causation and existence of specific diseases where such causation or existence is not "open to the senses." *Id.* The issue in *Aetna* revolved not around an alleged obligation of the jury to accept expert testimony, but, rather, the competency of lay witnesses to testify regarding medical facts in issue.

Other cases cited by the Petitioner in support of her position clearly support the decision of the Court of Appeals for the Sixth Circuit in the present case. The Court of Appeals for the Ninth Circuit in *Security-First National Bank of Los Angeles v. Lutz*, 322 F.2d 348, 355 (9th Cir. 1963), states that "expert testimony . . . is not conclusive upon the trier of fact, even though unimpeached and uncontradicted, since the trier may apply his own experience or knowledge in determining how far to follow the expressed opinion." The Court of Appeals for the Eighth Circuit in *Estate of Fitts v. Commissioner*, 237 F.2d 729, 732-33 (8th Cir. 1956), states that "the court is not bound by the opinion of the experts" and that expert testimony may be accepted "in toto, in part, or not at all." *Id.* (citing *Gloyd v. Commissioner*, 63 F.2d 649, 650 (8th Cir. 1953)). Likewise, reliance upon *Greenfeld v. Commissioner*, 165 F.2d 318, 319 (4th Cir. 1947), because of the foregoing analysis, controverts

rather than bolsters the Petitioner's argument. *Fitts*, *Greenfeld* and *Charles of the Ritz Distributors v. Federal Trade Comm'n*, 143 F.2d 676, 679 (2d Cir. 1944), are further distinguished from application to the present case by their underlying subject matter which invokes federal regulatory procedures and rules that are irrelevant in the present civil action.

Furthermore, under substantive Tennessee law, which is applicable in the present case, a jury is under no obligation to accept expert testimony as conclusive, but may give such testimony the weight which the jury believes it is entitled in view of all the evidence presented in a trial. *England v. Burns Stone Co.*, 874 S.W. 2d 32, 38 (Tenn. Ct. App. 1993). "Jurors are not required to accept expert or opinion evidence as conclusive, even though uncontradicted; but may draw upon the knowledge and experience which may be supposed to be common to all men and arrive at a conclusion contrary to expert testimony." *Id.* "Even when no opposing expert testimony is offered, the trier of fact is still bound to decide the issue upon its own fair judgment, assisted by expert testimony." *Roberts v. Roberts*, 827 S.W. 2d 788, 795 (Tenn. Ct. App. 1991) (citing *Gibson v. Ferguson*, 562 S.W. 2d 188, 190 (Tenn. Ct. App. 1976)).

The District Court in the present case correctly charged the jury that it was not required to accept the testimony of any expert and that, in determining how much weight to give to an expert's opinion, consideration should be given to the qualifications of the expert witness and the basis of the witness's conclusions. The District Court further charged the jury that it alone had the responsibility of determining the weight to be given to the testimony of an expert witness. (R. 80: Jury Charge at Tr. 365.) Petitioner raised no challenge to any portion of the charge delivered by the District Court, and the jury charge clearly followed applicable Tennessee law on the issue of the weight, if any, to be given to the opinion testimony of an expert witness.

See Airline Constr., Inc. v. Barr, 807 S.W. 2d 247, 270-71 (Tenn. Ct. App. 1990).

II.

THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT IN THE PRESENT CASE IS CONGRUENT WITH PRIOR DECISIONS OF THE SUPREME COURT OF THE UNITED STATES.

The Supreme Court of the United States has previously ruled, regarding expert testimony, that, "if the Court admits the testimony, then it is for the jury to decide whether any, and if any what, weight is to be given to the testimony." *Spring Co. v. Edgar*, 99 U.S. 645, 658 (1878). Expert opinions "thus offered, even if entitled to some weight, have no such conclusive force that there is error of law in refusing to follow them. This is true of opinion evidenced generally, whether addressed to a jury or to a judge or to a statutory board." *Sartor v. Arkansas Natural Gas Corp.*, 321 U.S. 620, 627 (1944) (quoting *Dayton Power & Light Co. v. Public Util. Comm'n*, 292 U.S. 290, 299 (1934)). The decision of the Court of Appeals for the Sixth Circuit in the present matter is in harmony with United States Supreme Court jurisprudence and neither directly nor indirectly contravenes the decision of any opinion by the Supreme Court of the United States.

The case of *Bene v. Jeantet*, 129 U.S. 683 (1889), is distinguished from the present case on several points. In *Bene*, the Supreme Court affirmed the decision of the Circuit Court of the United States for the Southern District of New York to dismiss the plaintiff's bill without prejudice because the plaintiff had failed to prove his sole issue of alleged infringement on a patent for an invention for the refinement of hair. *Id.* at 684-88. After reviewing the evidence presented at trial, including testimony of experts for both parties, the Supreme Court

concluded that the "complainants did not make out a case of infringement" and that there was "not a preponderance of evidence in their favor." *Id.* at 688. The Supreme Court in *Bene* did not mandate that the trier of fact in the lower court accept uncontradicted or controlling expert testimony. Rather, the Supreme Court upheld the responsibility of the trier of fact to weigh the testimony and evaluate its credibility.

III.

THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT IS CONGRUENT WITH PRIOR DECISIONS OF THE SIXTH CIRCUIT.

The United States Court of Appeals for the Sixth Circuit clearly upholds the rule that a jury is not required to accept expert testimony even though such testimony may be uncontradicted and unimpeached. *Powers*, 83 F.3d at 797. In *Powers*, the plaintiffs challenged the following instruction regarding treatment of the testimony of the plaintiffs' expert:

> You are not required to accept testimony even though the testimony is uncontradicted and the witness is not impeached.

Id. The Court of Appeals held that the trial court did not err "in so instructing the jury." *Id.* "The jury is instructed that it is completely free to accept or reject an expert's testimony, and to evaluate the weight given such testimony in light of the reasons the expert supplies for his opinion." *Id.* (quoting *The United States v. 0.161 Acres of Land, More or Less, Situated in the City of Birmingham, Ala.*, 837 F.2d 1036, 1040-41 (11th Cir. 1988)).

The decision of the Court of Appeals in the present case regarding the testimony of the Petitioner's expert, which

testimony stood neither uncontradicted nor unimpeached, is clearly consistent with the foregoing rule in *Powers*, and, therefore, consistent with the doctrine of *stare decisis*. The rule in *Roth Office Equip. Co. v. Gallagher*, 172 F.2d 452, 455 (6th Cir. 1949), if it remains valid, does not control the decision of the District Court in the present case because the testimony of the Petitioner's expert does not satisfy the stringent elements for the application of *Roth*. In the present case, the testimony of Petitioner's expert was effectively disputed, and matter upon which the witness testified was that upon which the jury, in view of contrary evidence, could exercise its independent judgment.

CONCLUSION

The decision of the United States Court of Appeals for the Sixth Circuit to permit the jury in the present case to reject expert testimony is in accord with prior decisions of the Court of Appeals for the Sixth Circuit, the Supreme Court of the United States and similar decisions throughout the Courts of Appeal in each of the federal circuits. Therefore, this Honorable Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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